Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-763

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA, PETITIONERS

v.

WELTOVER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act bars a foreign creditor's suit against a foreign state alleging that the state breached a contractual obligation to repay government bonds that are payable in New York and denominated in United States currency.

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INTEREST OF THE UNITED STATES

Petitioners, the Republic of Argentina and its Central Bank, challenge the court of appeals' determination that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, does not bar a civil suit brought by respondents, a Swiss bank and two Panamanian corporations, alleging that petitioners have breached their contractual obligation to repay government bonds issued to refinance private commercial debt. The United States has a twofold interest in this matter.

First, this Court's interpretation of the FSIA has an obvious and substantial impact on the United States' conduct of foreign relations. Second, the United States has a substantial interest in the operation of the international public debt market. That market (which includes

publicly-traded debt securities that are subject to federal securities laws) involves trillions of dollars, and its operation affects the economies of numerous nations throughout the world, the work of international financial organizations, and the financial positions of many private sector lending institutions and investors, as well as relations between the United States and other countries.

STATUTORY PROVISIONS INVOLVED

Section 1605(a) of the FSIA states in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a).

Section 1603 of the FSIA provides in relevant part:.

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

STATEMENT

1. *The Foreign Sovereign Immunities Act*

The FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 443 (1989). Enacted in 1976, the FSIA was intended to provide the courts with objective criteria to determine whether suits against foreign states could proceed. The FSIA replaced the prior ad hoc approach in which the courts deferred on jurisdictional issues to the Executive Branch's desires in light of foreign policy objectives. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-488 (1983).

The FSIA gives the United States district courts original subject matter jurisdiction over nonjury civil actions against a foreign state, including suits by foreign plaintiffs, as to claims for relief with respect to which the foreign state is not entitled to immunity under Sections 1605 through 1607 of the FSIA. 28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489. The FSIA further provides that the district courts shall have personal jurisdiction over the foreign state as to those claims where service of process has been made in accordance with the FSIA. 28 U.S.C. 1330(b).

The crucial inquiry is the scope of the foreign state's immunity. Section 1604 of the FSIA states the general rule:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. Sections 1605 through 1607 provide exceptions to that general rule that essentially codify the "restrictive" principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487-488. Under the restrictive

immunity principle, foreign nations and their instrumentalities can be sued in "cases arising out of a foreign state's strictly commercial acts," but not for actions "involving the foreign sovereign's public acts." *Id.* at 487.[1]

Section 1605(a) of the FSIA states that a foreign state is not entitled to immunity if, among other things, the foreign state waives it, 28 U.S.C. 1605(a)(1), or if the state engages in commercial activity having a prescribed nexus to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is based upon:

> (i) "a commercial activity carried on in the United States by the foreign state";[2]
>
> (ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
>
> (iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[3]

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[1] Prior to the enactment of the FSIA, the United States Department of State had espoused the restrictive immunity approach, which was followed by "almost every country in Western Europe." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8-9 (1976). See Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to the Attorney General (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711 (1976). The FSIA adopted the restrictive principle and further provided—in accordance with the practice followed in "virtually every country"—that the courts, rather than a "foreign affairs agency," would make the immunity determination. H.R. Rep. No. 1487, *supra*, at 9.

[2] The FSIA defines this phrase to mean "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. 1603(e).

[3] Section 1605(a) identifies other cases—such as certain types of property-based actions, personal injury actions, and arbitration

The FSIA instructs that, in determining if an activity is commercial, the courts are to look to the "nature" of the conduct rather than to its "purpose." 28 U.S.C. 1603(d). Thus, "the FSIA resolves the classic hypothetical of a foreign state's purchase of equipment for its armed forces: Such purchases are regarded as commercial in nature, notwithstanding their public purpose." G. Born & D. Westin, *International Civil Litigation in United States Courts* 363 (1989). See H.R. Rep. No. 1487, *supra*, at 16.

2. *The Financial Transactions at Issue*

Like the lower courts, we rely on the facts as alleged in the respondents' complaint (J.A. 6-12) and as set forth in affidavits filed in the pretrial proceedings (J.A. 13-19, 155-157). See Pet. App. 17a n.2. According to those sources, the Republic of Argentina and its citizens engaged in extensive borrowing during the late 1970s and became deeply indebted to foreign creditors that were entitled to repayment in an internationally recognized currency, such as United States dollars. Argentina's massive foreign debt, coupled with other substantial economic problems, led to devaluation of the Argentine currency (formerly the peso and currently the austral) with respect to the dollar. Pet. App. 2a-3a, 17a; J.A. 15-16.

The devaluation of Argentina's currency imposed a significant burden on Argentina's private debtors, who needed dollars to repay their foreign debts and could obtain those dollars only by exchanging their local currency. Argentina, through its Central Bank (Banco Central), therefore initiated a Foreign Exchange Insurance Contract (FEIC) program to help stabilize the exchange rate for its private debtors. The FEIC program was intended to protect private Argentine debtors from cur-

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proceedings—where a foreign state is not entitled to immunity. See 28 U.S.C. 1605(a)(3), (4), (5) and (6). Those provisions of the FSIA are not relevant here.

rency devaluations by allowing those debtors to purchase dollars at the then-current exchange rate for future repayment of foreign debts. Under this program, the debtor paid a fixed amount of local currency to Banco Central in advance of the maturity date of the foreign debt. Banco Central agreed, in turn, to provide the dollars necessary to repay the foreign debt when it matured. Pet. App. 3a, 17a; J.A. 16.

Argentina's economy continued to deteriorate. By the autumn of 1982, the Argentine government's foreign exchange reserves were insufficient to meet its obligations under the FEIC contracts to supply dollars to Argentine private debtors for payment of their debts. It therefore used new financial instruments—government bonds (known as Bonods) and promissory notes—to refinance the obligations of the Argentine private debtors. Under this refinancing program, the Argentine government gave a foreign creditor the option of accepting Bonods in satisfaction of the initial private debt—thereby substituting Argentina itself as the debtor—or maintaining the debt with the private Argentine debtor but accepting Bonods as guarantees for payment of the debt. The Bonods pay principal and interest only in United States dollars, with interest to be based on the London Interbank rate for Eurodollar accounts. Argentina provided that payment could be made in any of four locations—New York, London, Frankfurt, or Zurich—as designated by the creditor (the holder of the Bonods). Pet. App. 4a, 17a-18a; J.A. 25.[4]

Argentina's Central Bank issued Bonods in an aggregate principal amount of $1.3 billion. The Bonod pro-

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[4] The Bonods read in pertinent part: "They shall be paid by BANCO CENTRAL DE LA REPUBLICA ARGENTINA in United States Dollars through transfer on the New York, Frankfurt, London or Zurich markets, at the option of the bondholder, to the credit of the account opened to his name, which he shall specify at the time of subscription or [transfer], 30 days before the time of each service." J.A. 25.

gram, however, did not succeed as planned. Argentina's economic conditions worsened. In May 1986, soon after the initial interest payments on the Bonods were made, the Republic determined that it could not meet its foreign debt obligations. The Argentine government directed Banco Central unilaterally to extend the time for payments on the Bonods, thereby rescheduling the debts. Argentina notified the United States Department of the Treasury of that action. Pet. App. 4a, 18a-19a; J.A. 18.[5]

3. *The Proceedings Below*

According to the allegations in their complaint, respondents—a Swiss Bank and two Panamanian corporations—hold Bonods with an aggregate principal amount of approximately $1.3 million. They allege that petitioners designated agents in New York for administration and payment of the Bonods, that petitioners made some interest payments to respondents' New York bank accounts before the rescheduling, that respondents refused to accept the rescheduling, and that petitioners breached their repayment obligation under the terms of the Bonods. Pet. App. 2a, 16a; J.A. 6-12.

Respondents filed this action in the United States District Court for the Southern District of New York and invoked that court's jurisdiction under the FSIA. Respondents asserted that the district court had jurisdiction over the matter on two alternative grounds: (1) the

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[5] The complaint alleges that Bonods were issued to institutions located in the United States. J.A. 7. The affidavits, however, do not address that matter, and we do not believe it is relevant in this case. Nevertheless, we note, for the Court's information, that the United States Export/Import Bank (a wholly-owned United States government corporation) has informed us that Bonods were issued to private creditors in the United States, and a significant number of them eventually were transferred to that institution as part of its foreign trade guarantee functions. The Export-Import Bank no longer has physical possession of its Bonods. They were surrendered to Argentina after a payment rescheduling was negotiated between the United States and Argentine governments.

action was based on a commercial activity within the meaning of Section 1605(a)(2) of the FSIA; and (2) petitioners had waived, either expressly or implicitly, their immunity under Section 1605(a)(1) of the FSIA. J.A. 7.

Petitioners appeared and moved to dismiss the suit for lack of jurisdiction, claiming that respondents' action did not fall within either of those FSIA exceptions to immunity. The district court denied petitioners' motion, ruling that respondents' suit was contained within the third clause of the commercial activity exception—the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2).

The district court concluded that petitioners' issuance of financial instruments to satisfy private debts "fall[s] squarely within the parameters of what private commercial entities do" and was "a quintessentially commercial act." Pet. App. 21a. The court rejected petitioners' argument that their issuance of the Bonods was a "sovereign activity" designed to alleviate Argentina's debt crisis and to implement the nation's currency control regulations. The court explained that "the plain language of the FSIA" requires a court "to look to the nature of the act, and not its purpose." *Id.* at 21a-22a. It next concluded that the failure to pay a debt made payable in the United States—even if the debt is owed to a foreign creditor—causes a "direct effect in the United States." *Id.* at 23a-24a.[6]

The court of appeals affirmed. It agreed with the district court that an activity is "commercial" for purposes of the FSIA if it is conduct that a private party might engage in for profit, even if the foreign nation is motivated by concerns other than profit. Pet. App. 7a-8a. It

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[6] The court found no need to reach the issue whether petitioners had waived their immunity. Pet. App. 19a n.4. The court also rejected petitioners' argument that respondents' action should be dismissed for lack of personal jurisdiction, *id.* at 24a-27a, and under the doctrine of forum non conveniens, *id.* at 27a-29a.

further stated that a court must "isolate the specific conduct that underlies the suit, rather than focusing on 'the broad program or policy of which the individual transaction is a part.'" *Id.* at 8a. The court also agreed that the primary focus, for purposes of the FSIA, must be on the "nature" of the activity rather than on its "purpose": "When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome." *Id.* at 9a.

The court of appeals concluded that the nature of the relevant activity here—"the issuance of debt instruments"—is an activity that private parties engage in for profit and is "clearly commercial." Pet. App. 9a, 10a. The court also ruled that the activity had an adequate United States nexus for purposes of the FSIA. It concluded that "[b]ecause [petitioners'] breach of the Bonod agreement deprived [respondents] of their contractual rights to receive payment in U.S. dollars, [petitioners'] acts caused a direct effect to [respondents]." *Id.* at 12a. Furthermore, "the act of nonpayment caused a direct effect in the United States" because:

> The legally significant act was [petitioners'] failure to abide by the contractual terms; *i.e.*, to make payments in New York. The effects occurred, in the first instance, in New York, when the [respondents'] accounts were not credited with the outstanding amount of U.S. dollars.

Id. at 14a. The court of appeals also gave weight to the United States' interest in maintaining New York's status as a financial center. *Ibid.*

SUMMARY OF ARGUMENT

Section 1605(a)(2) of the FSIA states in relevant part that a foreign state is not immune from suit in any case in which the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that

act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). The lower courts correctly concluded that Section 1605(a)(2) denies petitioners immunity in this action, where respondents have alleged that a foreign state breached a contractual obligation to make payment on debt instruments that can be held by private creditors, are payable in New York, and are denominated in United States currency.

Petitioners are mistaken in asserting that respondents' suit is not based on an act "in connection with a commercial activity of the foreign state." 28 U.S.C. 1605(a)(2). The issuance of debt instruments that can be held by private creditors is a commercial activity. Petitioners' reliance on the assertedly "sovereign" purpose in issuing the debt instruments—to alleviate a monetary crisis and to benefit the Argentine economy—is misplaced. The FSIA expressly states that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d).

Petitioners are also mistaken in asserting that their unilateral rescheduling of payments did not have a "direct effect in the United States." 28 U.S.C. 1605(a)(2). Petitioners do not dispute that they undertook a contractual obligation to make principal and interest payments in New York using United States currency. The court of appeals correctly concluded that petitioners' rescheduling of payments had the direct effect of breaching their performance obligation in this country.

In short, the FSIA, applied according to its plain terms, does not extend immunity to a foreign state in a suit that is based on the state's alleged breach of an obligation to make payments on debt instruments that can be held by private creditors, are payable in the United States, and are denominated in United States currency. Additionally, a specific ruling to that effect would provide

clear guidance to foreign states, as well as lending institutions and investors, in determining a foreign state's amenability to suit in this country.

ARGUMENT

A FOREIGN STATE IS NOT IMMUNE IN A UNITED STATES COURT FROM A CIVIL ACTION ALLEGING THAT THE STATE HAS BREACHED ITS OBLIGATION TO REPAY ON A DEBT INSTRUMENT THAT CAN BE HELD BY A PRIVATE CREDITOR, IS PAYABLE IN THE UNITED STATES, AND IS DENOMINATED IN UNITED STATES CURRENCY

The FSIA provides a straightforward answer to the question whether petitioners are immune from respondents' breach of contract action. Petitioners' issuance of debt instruments that can be held by private (nongovernmental) creditors is a "commercial activity" within the meaning of the FSIA. See 28 U.S.C. 1603(d). Their subsequent rescheduling of the contractual obligations set forth in those debt instruments is an act "in connection with" that activity that "causes a direct effect in the United States," 28 U.S.C. 1605(a)(2), because it breaches their contractual obligation to pay a dollar-denominated debt in New York. The FSIA accordingly subjects petitioners to suit in a United States court. Petitioners' challenges to the "commercial" nature of their activity and the "direct effect" of their debt rescheduling are unpersuasive, given the language and design of the FSIA. The result they urge would replace a clear, reasonable, and workable rule with an uncertain ad hoc inquiry. That sort of inquiry is undesirable in cases involving the commercial activity exception to foreign sovereign immunity, where foreign states and private creditors need clear guidance in determining the legal consequences of their dealings.

A. A Foreign State's Issuance of Debt Instruments That Can Be Held by Private Creditors Is a "Commercial Activity"

Petitioners contend that their issuance of Bonods was not "commercial activity" within the meaning of Section 1605(a)(2) of the FSIA. That contention, however, is at odds with the definition that Congress provided. Congress stated that a "commercial activity" means "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. 1603(d). Congress's repetition of the term "commercial" in its definition indicates that Congress intended that term to retain its general meaning, which denotes a relationship or connection to "trade and traffic or commerce." *Black's Law Dictionary* 245 (5th ed. 1979). As the Second Circuit observed, the courts of appeals have generally applied a "pragmatic approach" in evaluating the commercial nature of a foreign state's undertakings. Pet. App. 7a.[7]

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[7] The Department of State's Legal Adviser, in testimony supporting enactment of the FSIA, identified the underlying rationale for focusing on the "commercial" nature of the activity:

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach * * *.
>
> The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976) (testimony of Monroe Leigh). The House Report on the bill explained:

> [S]ection 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral

Petitioners' issuance of Bonods is just such a commercial activity. The Argentine Bonod is a certificate of indebtedness under which petitioners promise to pay the holder a specified amount of interest for a specified length of time, and to repay the loan on the expiration date. See J.A. 20-25. It is, in short, no different in its essential terms from a bond that might be issued by a business corporation in the private sector. The issuance of such debt instruments, like the issuance of promissory notes, mortgages, and commercial paper, is by its nature a commercial activity. See, *e.g.*, *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) ("It is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2).").[8]

Petitioners argue that reading the FSIA according to its plain terms results in an inappropriate per se rule that issuance of public debt is commercial activity. Pet. Br. 14-17.[9] They rely on the FSIA's legislative history,

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> extraction company, an airline or a state trading corporation. Certainly, if the activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

H.R. Rep. No. 1487, *supra*, at 16.

[8] Although the foreign government debt securities at issue here do not appear to have been publicly offered in the United States or listed for trading on a United States national exchange, foreign debt is regularly distributed in public offerings in the United States over-the-counter and on national exchanges. Foreign government debt securities are subject to the registration, disclosure and civil liability provisions of the federal securities laws. See generally Greene & Adee, *The Securities of Foreign Governments, Political Subdivisions, and Multinational Organizations*, 10 N.C. J. Int'l L. Com. Reg. 1 (1985). Indeed, defaults on foreign government bonds and abuses in the sale of such securities were significant considerations in the enactment of federal securities laws. See *ibid.*; L. Loss & J. Seligman, *Securities Regulation* 743-758 (3d ed. 1989).

[9] We are not urging such a broad rule. For example, bilateral lending transactions between central banks of two states may not

which shows that an unenacted version of the FSIA contained a provision that would have preserved a foreign state's immunity in cases "relating to debt obligations incurred for general governmental purposes." See H.R. 11315, 94th Cong., 2d Sess. § 1606 (1976) (*reprinted in* 122 Cong. Rec. 33,533 (1976)); see also S. 3553, 94th Cong., 2d Sess. § 1606 (1976) (*reprinted in* 122 Cong. Rec. 17,463 (1976)). Petitioners, however, draw the wrong conclusion from Congress's deletion of that provision from the enacted bill.

Petitioners argue, based on excerpts from the House Report explaining the change, that Congress's intention in deleting the public debt exception was to allow the courts to examine debt instruments on a case-by-case basis. The full passage from the House Report does not support that assertion. The Report states:

> Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606. *The public debt provision was, at best, very limited.* It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific governmental projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. *Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would*

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necessarily constitute commercial activity. Such transactions, however, would likely differ substantially in form and terms from the present situation, which involves the issuance of debt instruments that can be held by private creditors.

> *be subject to U.S. regulation, such as that provided by the securities laws.* Thus, on reconsideration of all of the factors, the *committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.*

H.R. Rep. No. 1487, *supra*, at 10 (emphasis added). This passage indicates that the drafters removed the "very limited" public debt exception because, among other reasons, the issuance of a debt instrument is an activity "of a commercial nature." *Ibid.* See also *id.* at 16 (describing a foreign state's "borrowing of money" as an example of a commercial activity); Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 Am. J. Int'l L. 399, 405 (1977).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 442-443 (1987). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). Thus, Congress's deletion of the provision granting immunity based on actions "relating to debt obligations" bolsters the conclusion that petitioners are not entitled to immunity in connection with their issuance of the Bonods.[10]

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[10] Petitioners' reliance on the unenacted public debt exception is misplaced, in any event, because it is doubtful that the Bonods at issue here would have been encompassed within that exception. Petitioners issued the Bonods in substitution for or as a guarantee of a privately incurred debt and not for a "general governmental purpose[]." See J.A. 17. Additionally, petitioners are mistaken in relying on pre-FSIA law to assert that issuance of debt instruments is not a commercial activity. See Pet. Br. 15-16. The FSIA superseded that law and it thus cannot alter the plain effect of the FSIA's provisions. Similarly, petitioners are mistaken in attempting to import and apply non-FSIA principles governing federal and state immunity. Pet. Br. 17. The Court's role here is to interpret the FSIA in accordance with its express terms.

3. Petitioners also contend that their issuance of the Bonods must be "analyzed in context" to determine whether it is commercial activity. Pet. Br. 17-24. Specifically, petitioners argue that the court should have taken into account that the Bonods were issued

> to fulfill [Argentina's] obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange.

Id. at 23-24. Additionally, petitioners argue that the court should have considered that the Bonods "raised no capital," "were not the mechanism for financing trade or acquisitions by a government entity" and were issued "without receiving consideration commensurate with their value in any customary sense." *Id.* at 24.

At bottom, petitioners simply invite the Court to evaluate the character of their Bonod issuance by reference to its purpose. The FSIA, however, plainly states:

> The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. 1603(d). The first two factors that petitioners assert are relevant—petitioners' need to fulfill its FEIC obligations and to conserve foreign currency—simply explain the governmental purpose that motivated petitioners to issue the debt instruments. Likewise, the remaining three factors—the debt instruments raised no capital, did not finance government acquisitions, and were issued without commensurate consideration—even if true, simply illustrate that the government incurred the contractual obligation for purposes other than those that motivate a private party. A foreign state can put forth such arguments in virtually any case of issuance of public debt to private creditors or investors. The FSIA plainly states

that those factors do not alter the otherwise commercial character of an activity.[11]

To be sure, the court of appeals stated that there may be circumstances where the "nature" of an activity cannot be determined without some reference to its "purpose." Pet. App. 9a. Whatever the validity of that observation in the abstract, it does not come into play here. As the court of appeals stated: "When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome." *Ibid.* That is the case where a foreign state issues a bond or other instrument of debt that can be held by a private creditor.

B. A Foreign State's Rescheduling of Debt Payments Causes a "Direct Effect in the United States" if It Breaches a Contractual Obligation To Repay Dollar-Denominated Obligations in the United States

Petitioners contend that their unilateral rescheduling of their debt obligations did not "cause[] a direct effect in the United States." Pet. Br. 28-40. They argue that the "effect" in this case is insufficient because: the plain-

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[11] The House Report is consistent with that conclusion:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

H.R. Rep. No. 1487, *supra*, at 16. Petitioners concede that the FSIA confers no immunity when a foreign state enters into a contract to obtain boots for its army, notwithstanding its purpose of promoting the national defense. Pet. Br. 22 n.17. Similarly, the FSIA confers no immunity when a foreign state enters into a contract to refinance private debts (in effect, to obtain foreign currency) notwithstanding its public purpose of promoting the national economy.

tiffs here are foreign creditors (*id.* at 26-27); the dispute has an insufficient relationship to the United States (*id.* at 28-32); the effects here would be insufficient to support long-arm jurisdiction in a domestic case (*id.* at 32-35); and assertion of personal jurisdiction in this case would violate the Due Process Clause (*id.* at 35-40). Those arguments are unpersuasive.

As the court of appeals correctly concluded, the rescheduling of the debt obligations "cause[d] a direct effect in the United States" because it breached a contractual obligation to pay a debt denominated in dollars that was payable in the United States. The place where there is a legal obligation to repay a debt is a matter of central importance in debtor-creditor relationships, because it is the place of performance of the contractual obligation. It is especially important in the case of international transactions, which can be subject to currency exchange restrictions. In the case of dollar denominated transactions, New York (or another international banking center in the United States) is frequently designated as a place of performance specifically because it provides a commercial forum where a dollar-based transaction can be completed without encountering currency restrictions, such as those that existed in Argentina, that limit the availability of foreign currency. See J.A. 15.

Petitioners do not dispute that the Bonods, by their terms, are legally payable (at the option of the holder) at four major locations where dollar-denominated transactions can be made (New York, Frankfurt, London, or Zurich); that respondents elected payment in New York; or that the debt instruments imposed a legal obligation to pay the debt there. See Pet. Br. 9, 25.[12] Under the

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[12] Petitioners do not contend here, nor did they contend below, that the provisions in the Bonods designating New York as a place of payment were mere remittance instructions for a debt that they are legally obligated to pay at some other location. Compare *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1124 (5th Cir. 1985). Nor do they contend that governing law would make the Bonods legally

facts alleged in the complaint, petitioners' act of rescheduling its debt payments (which we assume occurred outside the United States) breached that obligation and therefore caused a direct effect in the United States.

Petitioners are mistaken in arguing that there was no direct effect in the United States because the creditors are not citizens of the United States and the injury to their interest would be felt elsewhere. Pet. Br. 26-27. As petitioners later acknowledge, "the residence of the plaintiff in the forum is not a requirement for the assertion of jurisdiction over a foreign defendant." *Id.* at 39 n.37. Indeed, this Court has specifically held that the FSIA allows "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied." *Verlinden*, 461 U.S. at 489.[13]

Petitioners' suggested approach, which would require a court to ascertain the "effect" of a foreign state's act by examining the place where the "economic loss [is] suffered" (Pet. Br. 26) would provide an intractable standard for resolving the jurisdictional question. A foreign state would be unable to assess its immunity from suit at the time the debt is issued or thereafter. It is far more sensible to determine a foreign state's amenability

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payable elsewhere. Compare *United States* v. *First Nat'l City Bank*, 321 F.2d 14, 20-22 (1963) (describing the "separate entity" rule, under which a bank deposit at a foreign branch is legally payable only at that branch), aff'd en banc, 325 F.2d 1020 (2d Cir. 1964), rev'd on other grounds, 379 U.S. 378 (1965). Cf. *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, petition for cert. pending, No. 91-689 (filed Oct. 24, 1991).

[13] Congress was aware of the danger that foreign parties might attempt to convert the courts of the United States into "international courts of claims," Pet. Br. 29, but it "protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some sort of substantial contact with the United States." *Verlinden*, 461 U.S. at 490. See also *id.* at 490 n.15 (noting the availability of forum non conveniens dismissal).

to suit by a foreign creditor through a commercially relevant criterion that is fixed by the terms of the agreement or by governing law—the place where the debt is legally payable.

Petitioners are also mistaken in arguing that the transaction has an insufficient connection with the United States. Pet. Br. 28-32. First, petitioners' alleged refusal to pay their debt has more than a "general effect" (*id.* at 26-27) in this country. As we have explained, it results in the breach of their duty to perform a contractual obligation here. As the court of appeals correctly recognized, the breach of a prescribed duty is a specific, legally significant event. See Pet. App. 13a. See, *e.g.*, *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988); *L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F. Supp. 114, 121-122 (S.D.N.Y. 1988).

Petitioners similarly are mistaken in contending that there was no "substantial" or "foreseeable" effect in the United States. Pet. Br. 29-32.[14] The FSIA does not by its terms require that the "direct effect" be substantial and foreseeable. In this respect, the third clause of Section 1605(a)(2) contrasts with the first clause, for which Section 1603(e) specifies the need for "substantial

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[14] Petitioners derive those considerations from a statement in the House Report, which provides that the "direct effects" requirement "would embrace commercial conduct abroad having direct effects within the United States which would subject conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." H.R. Rep. No. 1487, *supra*, at 19. Section 18, which actually deals with the extraterritorial application of United States law, provides that such application is permissible if the "effect within the territory is substantial" and it "occurs as a direct and foreseeable result of the conduct outside the territory." See Pet. App. 11a. See also Restatement (Third) of the Law, Foreign Relations Law of the United States § 421(2)(j) (1986) (providing that a state may exercise jurisdiction to adjudicate where, among other things, an entity has "carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state").

contact" with the United States. Nevertheless, if substantiality and forseeability were regarded as providing the criteria for a "direct effect," those criteria are satisfied here. The breach is a "substantial" effect in the legally relevant sense because the place of payment is central to performance of a contractual debt obligation, and the failure to pay there denies the creditor the benefits to which he is contractually entitled.[15] Furthermore, a breach in the United States was foreseeable in light of the fact that New York is the designated place of performance. Petitioners' inquiry into whether respondents have suffered a "substantial financial loss" (Pet. Br. 30) would involve the courts in unpredictable ad hoc inquiries into the magnitude and location of a financial injury.[16]

Petitioners argue that subjecting them to suit in this context is inconsistent with "traditional principles of 'long arm jurisdiction.'" Pet. Br. 32-35. They rely on the "paradigm" in which

> a borrower, without leaving its own state, enters into a transaction with a lender from another state, payable at the lender's place of business, and the

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[15] The United States favors enforcement of contracts in accordance with their terms in the context of sovereign debt restructurings. See *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-522 (2d Cir.), cert. dismissed, 473 U.S. 934 (1985).

[16] Petitioners correctly observe (Pet. Br. 31) that subject matter jurisdiction over extraterritorial violations of the federal securities laws may be based on an act causing injuries to United States investors or having an adverse impact on the market of a security traded in the United States. See, *e.g.*, *Des Brisay* v. *Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206, modified on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). The absence of such effects, however, is not dispositive of whether a foreign state's act has caused "a direct effect in the United States." 28 U.S.C. 1605(a)(2). Notably, the relevant injury or impact in the securities law context typically stems from tortious conduct rather than breach of a contractual obligation.

> lender subsequently attempts to sue the borrower in the state of lender's place of business.

Id. at 32. Petitioners contend that the "prevailing view" (*id.* at 33) is that the exercise of long arm jurisdiction is inappropriate unless "the underlying transaction also had a significant forum state connection." *Id.* at 32-33, citing 2 R. Casad, *Jurisdiction in Civil Actions* § 8.02, at 8-38 to 8-39 (2d ed. 1991). The treatise they cite is less definitive on this point than the assertions in their brief.[17] In any event, the "paradigm" they use—the case of a domestic borrower who "does not leave his own state"—does not aptly describe the case of a foreign sovereign. But most importantly, international transactions that are payable in a particular forum and in the currency of that forum have a significant—and frequently essential—connection to that forum.

The designation of a place of payment has special implications, both legal and practical, in the case of international transactions. As a legal matter, the parties must select a location that allows for settlement of the debt free, to the extent possible, from political risk, currency exchange restrictions, and other limitations that might affect repayment.[18] As a practical matter, the parties

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[17] The treatise states:

> An examination of the cases in which the note in suit was executed outside the forum state indicates clearly that execution of the note in the forum state is not necessary to long-arm jurisdiction over the maker. Many cases have upheld long-arm jurisdiction over the maker of a note that was executed outside, but was payable in the forum state. In most of those cases, however, the underlying transaction also had a significant forum state connection.

2 R. Casad, *supra*, § 8.02, at 8-37 to 8-38 (footnote omitted).

[18] Foreign states frequently assert dominion over debts that are to be repaid in their territory. See generally Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594 (1986). That element of "sovereign risk" can influence the parties' choice of the appropriate place of payment, as well as the substantive law of other affected states. For example, the Federal

must select a forum that has a sufficient supply of the relevant currency and effective mechanisms for settling the debt. As mentioned above, New York is ofen designated as the place of payment in the case of dollar-denominated transactions.[19]

Petitioners issued dollar-denominated debt instruments payable in New York. Thus, they purposefully availed themselves of the benefits of the United States forum, which presumably increased the attractiveness and value of their debt instruments. Moreover, they took other purposeful steps, such as the appointment of a financial agent in New York, J.A. 8, and the establishment of the necessary correspondent bank accounts, to facilitate the transactions. Thus, the situation here is a far cry from the mere "nonreceipt of payment in New York maildrop bank accounts." Pet. Br. 31. Rather, petitioners' issuance of dollar denominated debt in which New York was designated as the place of payment was a conscious and deliberate choice from which they obtained substantial benefits.

Finally, petitioners are incorrect in asserting that an interpretation of the FSIA subjecting petitioners to suit in the United States would "exceed constitutional due process limits." Pet. Br. 35-40. Petitioners acknowledge that "[w]hether there is a constitutional basis for personal jurisdiction over [them] is not before the Court

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Reserve Board's regulations recognize that "[a] customer who makes a deposit that is payable solely at a foreign branch [of a United States bank] assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. 204.128(c).

[19] The Federal Reserve Bank of New York can provide access to ample United States currency to satisfy commercial transactions. Additionally, the Federal Reserve Bank and the New York Clearing House Association, through its Interbank Payment System (CHIPS), provide the necessary mechanisms for clearing and settling the relevant transactions. See generally Lingl, *Risk Allocation in International Interbank Electronic Fund Transfers: CHIPS & SWIFT*, 22 Harv. Int'l L. J. 621 (1981).

as an independent question." Pet. Br. 36 n.33.[20] The Due Process Clause is implicated only indirectly here: the House Report on the FSIA indicates that the FSIA embodies the "requirements of minimum jurisdictional contacts and adequate notice." H.R. Rep. No. 1487, *supra*, at 13.

As petitioners recognize, the "minimum contacts" test is intended to ensure that maintenance of the suit in the forum state "does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). That test is satisfied where, as here, a foreign state breaches a contractual obligation to repay government bonds that are payable in New York and denominated in United States currency. This Court's decision in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), identifies the controlling principle. The critical inquiry is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 474. Thus, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 475.

Assuming that the FSIA's provisions embody the "minimum contacts" requirement, there can be little doubt

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[20] Significantly, this Court has never held that a foreign state is a "person" for purposes of the Due Process Clause. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."); but see, *e.g.*, *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981) (holding that a foreign state is a "person" for purposes of the Due Process Clause), cert. denied, 454 U.S. 1148 (1982). Cf. *Verlinden*, 461 U.S. at 486 ("foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

that that test is met in this case. Petitioners "purposefully avail[ed]" themselves of the privilege of conducting activities in the United States when they issued bonds that are payable in New York and denominated in United States currency. As we have explained, petitioners obtained substantial benefits from that deliberate, unilateral decision. Their debt instruments became more attractive (and hence more valuable), because they were not subject to the currency exchange limitations and other laws that might restrict repayment elsewhere. Petitioners' conduct and connections with New York are sufficiently concrete, and the resulting benefits sufficiently substantial, that they should have reasonably anticipated being haled into court there.[21]

In sum, we believe that the governing rule should be this: A foreign state is not immune from suit in United States courts based on the breach of a contractual obligation to repay on a debt instrument that can be held by a private creditor, is payable in the United States, and is denominated in United States currency. That clear and cogent rule is not only consistent with the FSIA, but it would provide definitive guidance to foreign states in structuring their debt offerings and determining their amenability to suit in this country.

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[21] This Court's decision in *Burger King* indicates that, when a court evaluates a constitutional claim, it may also take into account additional factors to ensure that the assertion of personal jurisdiction will "comport with 'fair play and substantial justice.'" 471 U.S. at 476. See also *Asahi Metal Industries Co.* v. *Superior Court*, 480 U.S. 102, 113-116 (1987). Petitioners do not suggest that such an inquiry is necessary here. Indeed, Congress itself has weighed such factors in formulating the "commercial activity" exception. It has determined that a foreign state should be answerable "in any case * * * in which the action is based upon * * * an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). If petitioners' acts fall within the terms of the statutory language, then that should be the end of the matter.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45344